

A New Coal Policy for Alberta in the Age of Net Zero: Questions of Implementation

A Submission by Nigel Bankes to the Alberta Coal Policy Committee

A New Coal Policy

Alberta needs a new coal policy. The 1976 Coal Policy is flawed by ambiguity and outdated. The current reinstatement of the 1976 Policy is a band aid solution.

The main elements of a new policy must be premised on the following:

- Net zero CO₂ emissions by 2050 ([IEA, 2021](#))
- Watershed protection and ecosystem function as the highest priority for land use in the eastern slopes (see submission from Rainer Knopff, Harvey Locke, Ted Morton and Kevin Van Tighem)
- Ensuring an effective private liability regime for reclamation and abandonment of existing mines including selenium management (see Drew Yewchuk's submission)

With these premises I anticipate that a new coal policy will, *inter alia*

- Prohibit all new surface coal mines (thermal or metallurgical) and expansions of existing mines in the eastern slopes, whatever the existing 1976 coal policy category.
- Prohibit all new thermal coal mines and expansion of existing thermal coal mines anywhere within the province.
- Subject any proposed underground metallurgical coal mine (if any) to the selenium standards to be established in the proposed federal Coal Mining Effluent Regulations (i.e. no grandparenting, see Yewchuk) and to a rigorous analysis to assess market demand, the economic life of any project and abandonment and reclamation liabilities.

Questions of Implementation

For the purpose of my remarks, I propose to take all of these elements (or some version of them) as 'givens' because I want to focus on how we might implement a new coal policy. I discuss three main points: (1) why any new coal policy should be legally binding; (2) the options for making a new coal policy legally binding; and (3) potential issues of compensation.

Legally binding. It is important that the terms of the new coal policy should be clear and avoid ambiguity (such as the ambiguities associated with the current category 2 lands) and the policy itself should be legally binding on all relevant parties. Relevant parties would include the Minister of Energy and the Department, the Alberta Energy Regulator; parties who hold agreements under the *Mines and Minerals Act*; and *owners of private coal rights and their lessees*. The main reasons for considering that a new coal policy should be legally binding are: (1) to provide clarity to all concerned as to the status of the policy (it is sometimes too easy to dismiss something that is "just a policy"), and also (2) to avoid the scenario that evolved just over a year ago when Minister Savage, without any warning or consultation, simply purported to revoke an all-of-government policy (the 1976 Coal Policy) by means of a press release and the issuance of a Departmental Information Letter. Any proposal to change a coal policy that is

legally binding will require more public discussion and likely a debate in the legislative assembly.

Models for making a new coal policy legal binding. There are perhaps two main models available to make a new coal policy legally binding: (1) by incorporating the terms of the coal policy in relevant approved land use plans under the *Alberta Land Stewardship Act*, or (2) a stand-alone statute (eg a *Coal Policy Implementation Act*, or an *Eastern Slopes (Coal) Protection Act*) that accords legal effect to the entire coal policy or the most significant parts thereof. As between these two options I strongly favour the second options for a number of reasons.

- 1. The track record of the land stewardship planning process to date.** The track record of the land stewardship planning process to date suggests that it has proven very difficult, for whatever reason(s), to directly incorporate the provisions of the 1976 Coal Policy into relevant regional land use plans. While the South Saskatchewan Regional Plan contains some tangential references to the 1976 Policy there was still considerable ambiguity as to the legal effect of those references. Much the same is also true of the sub-regional planning processes within the region such as the Livingstone-Porcupine Hills Land Footprint Management Plan (2018). This Plan develops important management thresholds in the form of disturbance limits on motorized access and spatial human footprint targets (at 8 – 11) but when it comes to the coal policy, it too passes the buck (at 23):

As part of reviewing and incorporating the Integrated Resource Plans, the Government of Alberta will integrate a review of the coal categories for the South Saskatchewan Region (SSRP p. 61). New direction, consistent with footprint planning outcomes, will supersede the coal categories and may extend to all large-scale industrial surface disturbances, including coal. This new direction should be consistent with an integrated approach. It will specify where surface exploration and development can and cannot occur based on the best and most recent biodiversity sensitivity data.

And for more discussion see “Coal Law and Policy in Alberta, Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?” (February 15, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/02/Blog_NB_Coal_Policy_Part3.pdf

- 2. Land use planning under ALSA is a lengthy process.** Land use planning under *ALSA* is a lengthy process. There are good reasons why land use planning should take a long time. There are studies to be undertaken and a broad range of interests to be considered in the development of any new plan or the amendment of an existing plan. In the 12 years since the adoption of *ALSA* we have only been able to finalize two regional plans and in recent years the planning process simply seems to have stalled. We need to address the future of coal mining on the eastern slopes and throughout the province within a short time frame. We cannot afford to wait for legal effect to be accorded a new coal policy.
- 3. The eastern slopes of the Rockies engage multiple planning regions.** The eastern slopes of the Rockies engage multiple land use planning regions. This ties in to the last point. Currently, lands within Categories 2 and 3 are included within no less than five of

Alberta's seven planning regions, Upper Peace, Upper Athabasca, North Saskatchewan, Red Deer, and South Saskatchewan. We only have a complete plan for the South Saskatchewan Region and even in that case we must conclude that the Plan does not an inadequate job of incorporating even the existing 1976 Coal Policy let alone a new coal policy. At the current rate it will take decades to complete the remaining plans.

4. **Not all parts of approved ALSA plans are legally binding.** Not all parts of approved ALSA plans are legally binding - only those parts designated by Order in Council, see ALSA s 13(2.1). Albertans will want to see a public debate in the legislature as to the elements of a new coal policy that are to have legal effect.
5. **ALSA provides too many opportunities to delay implementation.** ALSA provides too many opportunities to delay implementation of an approved plan. These provisions include opportunities to seek a variance (s 15), or a review of a newly adopted Plan (s 19.2) as well as exceptionally complex compensation provisions (ss 19 – 19.1). While these procedural safeguards may be necessary in some cases, they are not suited to something like a coal policy.

Issues of compensation. It will be important to implement a new coal policy in a way that minimizes the potential liability of the province to claims for compensation (under domestic law or international investment law) and at the same time maintains Alberta's reputation as a safe place to invest. After all, Alberta will still need to attract investment to support the energy transition which is an essential part of the province's future.

Alberta already has in place the Mineral Rights Compensation Regulation, Alta Reg 317/2003, which provides compensation to the holders of Crown agreements where those agreements are cancelled when the Minister of Energy forms the opinion "that any or any further exploration for or development of the mineral to which the agreement relates within that location or part of it is not in the public interest." But some assessment needs to be made as to whether the approach taken in that regulation is fit for present purposes. We should be fair to investors, but we should also be careful not to over-compensate. Investors take risks. They take risks that government policies will change; they take the risk that their projects may never be approved; and all investors in carbon resources understand at a global level that we need to reduce our carbon footprint.

We also need to consider what approach should be taken with respect to privately owned coal lands which may be affected by the adoption of a new coal policy.

Issues of compensation could also be addressed in any legislation designed to implement a new coal policy.

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